SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 198

ALFRED W. JONES, Receiver for Georgia & Florida Railroad,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

Moultrie Hitt,
Counsel for Petitioner.

INDEX

Subject Index

Table of Cases Cited

TABLE OF STATUTES

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No. 198

ALFRED W. JONES, RECEIVER FOR GEORGIA & FLORIDA RAILROAD,

Plaintiff,

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Alfred W. Jones, sole and successive receiver of Georgia & Florida Railroad, prays that a writ of certiorari be issued to review the judgment of the Court of Claims of the United States entered April 5, 1948, in favor of William V. Griffin and Hugh William Purvis, Receivers for Georgia & Florida Railroad, plaintiffs, No. 45622, on the principal sum of their claim, but against them on the award of interest on said claim (Ct. Cl. R. 42).

Opinion Below

The Opinion of the Court of Claims (R. 12) is Reported at 77 Fed. Supp. 197.

Opinions In Prior Proceedings

Previous opinion of the Supreme Court of the United States in *U. S.* v. *Griffin*, No. 63 October Term 1937, is reported at 303 U. S. 226, 82 L. Ed. 764.

Opinions in prior proceedings are set out in transcript of record in the Supreme Court of the United States, No. 63, October Term, 1937 (303 U. S. 226), *United States of America and Interstate Commerce Commission, appellants* v. *W. V. Griffin and H. W. Purvis, Receivers for Georgia & Florida Railroad*, appeal from the District Court of the United States for the Southern District of Georgia (Ap. Ex. 1, R. 57), viz:

Opinion and Order of the Interstate Commerce Commission May 10, 1933 (Trans. No. 63 (1937, R. 5)) (R. 9 *) is reported at 192 I. C. C. 779.

Opinion and Order of Three Judge United States District Court for the Augusta Division of the Southern Judicial District of Georgia, January 23, 1935 (Trans. No. 63 (1937, R. 29) R. 57).

Opinion and Order of the Interstate Commerce Commission, Feb. 4, 1936 (Trans. No. 63 (1937, R. 41) R. 82); reported at 214 I. C. C. 66.

Opinion and Order of Three Judge United States District Court for the Augusta Division of the Southern Judicial District of Georgia Feb. 23, 1937 (Trans. No. 63 (1937, R. 55) R. 102).

Jurisdiction

The judgment of the Court of Claims was entered April 5, 1948 (R. 50). The jurisdiction of this Court is invoked under the Act of February 13, 1925, C. 229, Section 3, 43

* Page references to Trans. in No. 63 (1937) are to the side folio numbers.

Stat. 939, as amended May 22, 1939, C. 140, 53 Stat. 752, 28 U. S. C. A. 288.

Questions Presented

1. Whether the Court of Claims should have allowed interest upon the claim for a compulsory taking of property and services under statutory authority within the meaning of the Fifth Amendment.

2. Whether the Court of Claims should not have determined compensation under the Fifth Amendment as well as to give effect to an authorized order of the Interstate Commerce Commission as properly construed.

The Statute Involved Is

The Railway Mail Pay Act of July 28, 1916, 34 stat. 412 et seq., 39 U. S. C. A. 523 et seq., as set out in Appendix A.

Statement

The Special Findings of Fact by the Court below constitute an excellent comprehensive statement of the case, but, for the purpose of this petition the matter is stated more succinctly thus:

(1) This action was brought in the Court of Claims pursuant to the express opinion of the Supreme Court of the United States in a prior proceeding between the same parties and on the same cause of action, that, while a three judge District Court did not have jurisdiction under the Urgent Deficiencies Act; (a) if the Commission makes the appropriate finding of reasonable compensation but fails because of an error of law to order payment of the full amount which the railroad believes is payable under the finding, the Court of Claims has jurisdiction of an action for the balance; and (b) since the mail service is compulsory the Court of Claims.

would, under the general provisions of the Tucker Act have jurisdiction also of an action for additional compensation if an order is confiscatory, *U. S.* v. *Griffin*, 303 U. S. 226 (Finding 20, R. 26); and that "while the compensation fixed in a railway mail pay order is ordinarily measured by a rate, the ultimate question determined • • • is • • • • the proper compensation to be paid by the government to the railroad for services and the use of its property—the *quantum meruit* for carrying the mails (*U. S.* v. *Griffin*, 303 U. S. 226, 237).

(2) The service requisitioned by the Post Office Department was ordered on a space basis, and consisted of two minimum types or service, viz.:

(a) *The R. P. O. service*, the major part of the total service so requisitioned, consisted of furnishing the Post Office Department with the exclusive use of fifteen linear feet of space in a passenger car fitted and equipped, as specified by the Post Office Department, for a travelling post office (Pl. Ex. 19, R. 233), lighted, heated, cleaned and maintained (all at the railroad's expense), with postal clerks in charge, to take on and sort in transit, and put off the mail at stations along the route, together with the transportation thereof (Finding 4, R. 14) and (Finding 21, R. 26). For this service the rate of compensation previously fixed, by force of arbitrary classification in an average with the larger carriers (Finding 10, R. 18) and (Finding 13, R. 21), was at the rate of only 14½ cents per mile (Finding 22, R. 27).

(b) The *closed pouch service*, a minor part of the total service so requisitioned, consisted of having the railroad's passenger train employees take on, put off, and care for in transit, mail pouches and parcel post packages of any quantity which would not exceed a quantity which, if piled six feet high (with a passage between), would occupy not

more than three linear feet of the length of a passenger car (Finding 4, R. 14 and Finding 13, R. 19). For this closed pouch service the rate of compensation previously fixed by force of arbitrary classification in an average with larger carriers (Finding 13, R. 21), was at the rate of only 4½ cents per mile (Finding 22, R. 27).

(3) On April 1, 1931, the carrier to escape the evil of an arbitrary classification with other lines, instituted a new *separate* proceeding before the Interstate Commerce Commission, as provided for by the Railway Mail Pay Act (R. 53). In that new proceeding that Commission made a finding that the joint cost study after adjustments to which the carrier consented to satisfy the Post Office Department that it would be entirely fair, indicated that an increase of 87.4% would be necessary to overcome the deficiency in net railway operating income under the respective rates of (a) 14½ cents and (b) 4½ cents per mile, and to provide respectively, a return on that part of the carriers' investment allocable to mail service at the rate of 5.75% per annum (Finding 23, R. 27).

(4) The Post Office Department admitted that the plaintiffs were underpaid (Trans. in No. 63 (1937) R. 144), but, nevertheless insisted, for administrative convenience, that the compensation for plaintiffs be held down to not more than the rate previously prescribed on an average basis for lines over 100 miles in length (Trans. in No. 63, R. 142, 143, 144, and Pl. Ex. 1, R. 59, 60, 63).

(5) The Commission, despite its own finding that the cost study showed that an increase of 87.4% was necessary, and without genuine justification decided as the Post Master General desired, by ordering that the compensation for the applicant should continue at the same rates average which had been prescribed in a prior case (144 I. C. C. 675) for all

railroads over 100 miles in length (Finding 16, R. 22 and Finding 18, R. 25).

(6) For relief from the Commission's arbitrary action the claimant twice sought, by procedures under the Urgent Deficiencies Act and after hearings, arguments and briefs, obtained from a three judge United States District Court for the Augusta Division of the Southern District of Georgia decrees for injunctions against the Commission's orders as not being in compliance with the duty on the United States to pay "fair and reasonable compensation" and as not being "just and equitable" (Finding 17, R. 24, and Finding 19, R. 19). (See Appendix B hereto, from Trans. in No. 63, R. 57, 102.

(7) The Commission prosecuted an appeal from the said second decree and this Court held thereon that the three judge District Court did not have jurisdiction, but that there was a proper remedy through the Court of Claims (Finding 20, R. 26).

(8) In the Court of Claims the plaintiffs introduced evidence to support their claim under both heads, viz.:

(a) That the Commission had made an error of law; (b) and that its order was confiscatory (Findings 15 to 23, R. 21 and Findings 24 to 30, R. 28).

(9) The lower Court made an award for the principal sum of $186,707.06 (R. 50); but denied interest on the ground that to do so was forbidden by Section 177 Judicial Code as amended, because they were giving effect to an order of the Interstate Commerce Commission as properly construed, and not determining compensation in an original proceeding under the Fifth Amendment (R. 49).

(10) The plaintiff is satisfied with the amount of the principal sum of the Court's award as being proper under

either head, but it respectfully submits that under both heads (a) and (b) the issue was one for the determination of the just compensation required by the Fifth Amendment for the taking of property by statutory authority, hence interest is necessary to make just compensation full and complete.

Specification of Errors To Be Urged

The Court of Claims erred in respect to the following:

(1) In failing to award interest to make just compensation full and complete since the claim was for the compulsory taking of property and services (*U. S.* v. *Griffin*, 303 U. S. 226, 82 L. Ed. 764).

(2) In failing to hold that it was determining a claim for just compensation required by the constitution, whether it was (a) giving effect to an order of the Interstate Commerce Commission as properly construed, or was (b) determining just compensation because the order of the Commission was confiscatory (*U. S.* v. *New York Central R. Co.*, 297 U. S. 73, 73 L. Ed. 619); and (*U. S.* v. *Griffin*, 303 U. S. 226, 82 L. Ed. 764).

Summary

The statement of the case so sets out the facts, and, likewise, the specification of errors so sets out the issues—that any further summarization would be repetitious. If the judgment of the Court of Claims in the award of the principal sum is sustained, the substantial issue to the plaintiffs is the failure of the lower Court to award an additional amount for interest so as to make just compensation full and complete.

Reasons for Granting the Writ

Specification of Error 1

(1) In failing to award interest to make just compensation full and complete since the claim was for the compulsory taking of property and services (*U. S.* v. *Griffin*, 303 U. S. 226, 82 L. Ed. 764).

The plaintiff respectfully submits that this Court has already decided that the requisitioning of mail transportation under the Railway Mail Pay Act is a taking for which just compensation is a constitutional right. In construing this Act, this Court said in *U. S.* v. *New York Central R. Co.*, 279 U. S. 77, 78, 73 L. Ed. 619, that "the Government admits, *as it must*, that reasonable compensation for such required services is a constitutional right" (Italics supplied). Again, in *U. S.* v. *Griffin*, 303 U. S. 226, 238, 82 L. Ed. 764, when this same cause of action between the same parties was before it, this Court reiterated the proposition that railway mail service is compulsory.

The plaintiff further respectfully submits that for a compulsory taking by statutory authority the requirement of the Constitution that "just compensation" shall be paid is comprehensive, and one of the essential elements of just compensation is that of interest when the taking precedes the payment; hence the general rule that the United States will not be held liable for interest on unpaid accounts and claims does not apply. This Court said as much in the case of "*Seaboard Air Line* v. *United States*, 261 U. S. 302, 405, 67 L. Ed. 664, 670, viz.:

> "*The Constitution safeguards the right and § 10 of the Lever Act directs payment* (Italics supplied). The rule above referred to that, in the absence of agreement to pay or statute allowing it, the United States will not be held liable for interest on unpaid accounts and claims, does not apply here. The requirement that

"just compensation" shall be paid is comprehensive, and includes all elements, and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation."

It is true that in the said *Seaboard Air Line* case, the property involved was in the form of land, but it was not a case of condemnation. In that instance there, as here, there were statutory provisions for payment, in which nothing was said about interest, and the Court further said:

"Section 10 of the Lever Act authorizes the taking of property for the public use on payment of just compensation. There is no provision in respect of interest. *Just compensation is provided for by the Constitution, and the right to it cannot be taken away by statute.* Its ascertainment is a judicial function. *Monongahahela Nav. Co. v. United States*, 148 U. S. 312, 327, 37 L. Ed. 463, 468, 13 Sup. Ct. Rep. 622" (Italics supplied).

More recently in *U. S. v. Goltra*, 312 U. S. 203, 208, 85 L. Ed. 776, 781, this Court explained the principle further when it said:

"In the *Seaboard Air Line R. Co.* case § 10 of the Lever Act (August 10, 1917, 40 Stat. at L. 276, 279, chap. 53) authorizing the taking by eminent domain of property for the public use on payment of just compensation was under examination. It contains no specific provision for interest. This Court held that a taking under the authority of § 10 required the just compensation "provided for by the Constitution" and that such compensation is payable "as of the time when the owners were deprived of their property". This case, however, and the others cited in the preceding paragraph, involve the requisitioning or taking of property by eminent domain under authority of legislation. *The distinction between property taken under authorization of Congress and property appropriated*

without such authority has long been recognized" (Italics supplied).

The Constitution sets up no rule for discrimination between real property and property of other kinds where property is taken under authority of a statute, and therefore, the petitioner-plaintiff respectfully submits that this taking of property, duly authorized by a statute, is within the protection of the constitutional requirement for just compensation which must necessarily include interest from the time of taking in order for it to be full and complete.

Specification of Error 2

In failing to hold that it was determining a claim for just compensation required by the Constitution, whether it was (a) giving effect to an order of the Interstate Commerce Commission as properly construed, or was (b) determining just compensation because the order of the Commission was confiscatory (*U. S.* v. *New York Central R. Co.*, 279 U. S. 73, 73 L. Ed. 619); and (*U. S.* v. *Griffin*, 303 U. S. 226, 85 L. Ed. 776).

Specification of Error 2 is intended both to supplement specification of Error 1; and also to preserve points of law in case the defendant should make any contention that the decision in the Court below was not rested upon either of the (a) and (b) heads of jurisdiction of that Court as expressly determined by this Court in *U. S.* v. *Griffin*, 303 U. S. 226, 85 L. Ed. 776.

WHEREFORE, it is respectfully prayed that this petition for a Writ of Certiorari be granted.

Respectfully submitted,

MOULTRIE HITT,
Attorney for Alfred W. Jones, Receiver for Georgia & Florida Railroad, Petitioner;
601 Tower Building,
Washington, D. C.

Filed: August 5, 1948.

APPENDIX A

RAILWAY MAIL PAY ACT OF JULY 28, 1916

Sec. 5. That the Postmaster General is authorized and directed to readjust the compensation to be paid to railroad companies from and after the thirtieth day of June, nineteen hundred and sixteen, or as soon thereafter as may be practicable, for the transportation and handling of the mails and furnishing facilities and services in connection therewith upon the conditions and at the rates hereinafter provided. (28 U. S. C. 524)

The Postmaster General may state railroad mail routes and authorize mail service thereon of the following four classes, namely: Full railway post-office car service, apartment railway post-office car service, storage-car service, and closed-pouch service. (28 U. S. C. 525)

Full railway post-office car mail service shall be service by cars forty feet or more in length, constructed, fitted up, and maintained for the distribution of mails on trains. The authorization of full railway post-office cars shall be for standard-size cars sixty feet in length, inside measurement, except as hereinafter provided. (28 U. S. C. 526)

Apartment railway post-office car mail service, shall be service by apartments less than forty feet in length in cars constructed, fitted up, and maintained for the distribution of mails on trains. Two standard sizes of apartment railway post-office cars may be authorized and paid for, namely, apartments fifteen feet and thirty feet in length, inside measurement, except as hereinafter provided. (28 U. S. C. 527)

* * * * * * *

Service by full and apartment railway post-office cars and storage cars shall include the carriage therein of all mail matter, equipment, and supplies for the mail service and the employees of the Postal Service or Post Office Department, as shall be directed by the Postmaster General to be so carried. (28 U. S. C. 529)

Closed-pouch mail service shall be the transportation

and handling by railroad employees of mails on trains on which full or apartment railway post-office cars are not authorized, except as hereinbefore provided. The authorizations for closed-pouch service shall be for units of seven feet and three feet in length, both sides of car. (28 U. S. C. 530)

* * * * * * *

Where authorizations are made for cars of the standard lengths of sixty, thirty, and fifteen feet, as provided by this section, and the railroad company is unable to furnish such cars of the length authorized, but furnishes cars of lesser length than those authorized, but which are determined by the department to be sufficient for the service, the Postmaster General may accept the same and pay only for the actual space furnished and used, the compensation to be not exceeding pro rata of that provided by this section for the standard length so authorized: *Provided*, That the Postmaster General may accept cars and apartments of greater length than those of the standard requested, but no compensation shall be allowed for such excess lengths. (28 U. S. C. 532)

* * * * * * *

In computing the car miles of the full railway post-office cars and apartment railway post-office cars, the maximum space authorized in either direction of a roundtrip car run shall be regarded as the space to be computed in both directions, unless otherwise mutually agreed upon. (28 U. S. C. 534)

The Postmaster General is authorized to make special contracts with the railroad companies for the transportation of the mails where in his judgment the conditions warrant the application of higher rates than those herein specified, and make report to Congress of all cases where such special contracts are made and the terms and reasons therefor. (28 U. S. C. 565)

All cars or parts of cars used for the Railway Mail Service shall be of such construction, style, length, and character, and furnished in such manner as shall be required by the Postmaster General, and shall be constructed, fitted up, maintained, heated, lighted, and cleaned by and at the

expense of the railroad companies. No pay shall be allowed for service by any railway post-office car which is not sound in material and construction and which is not equipped with sanitary drinking water containers and toilet facilities, nor unless such car is regularly and thoroughly cleaned. (28 U. S. C. 537) * * *

* * * * * * *

Railroad companies carrying the mails shall furnish all necessary facilities for caring for and handling them while in their custody. They shall furnish all cars or parts of cars used in the transportation and distribution of the mails, except as herein otherwise provided, and place them in stations before the departure of trains at such times and when required to do so. They shall provide station space and rooms for handling, storing, and transfer of mails in transit, including the separation thereof, by packages for connecting lines, and such distribution of registered mail in transit as may be necessary, and for offices for the employees of the Railway Mail Service engaged in such station work when required by the Postmaster General, in which mail from station boxes may be distributed if it does not require additional space.

If any railroad company carrying the mails shall fail or refuse to provide cars or apartments in cars for distribution purposes when required by the Postmaster General, or shall fail or refuse to construct, fit up, maintain, heat, light, and clean such cars and provide such appliances for use in case of accident as may be required by the Postmaster General, it shall be fined such reasonable sum as may, in the discretion of the Postmaster General, be deemed proper. (28 U. S. C. 538)

The Postmaster General shall in all cases decide upon what trains and in what manner the mails shall be conveyed. Every railroad company carrying the mails shall carry on any train it operates, and with due speed, all mailable matter, equipment, and supplies directed to be carried thereon. If any such railroad company shall fail or refuse to transport the mails, equipment, and supplies when required by the Postmaster General on any train or

trains it operates, such company shall be fined such reasonable amount as may, in the discretion of the Postmaster General, be deemed proper. (28 U. S. C. 539)

* * * * * * *

All railway common carriers are hereby required to transport such mail matter as may be offered for transportation by the United States in the manner, under the conditions, and with the service prescribed by the Postmaster General and shall be entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith. (28 U. S. C. 541)

The Interstate Commerce Commission is hereby empowered and directed as soon as practicable to fix and determine from time to time the fair and reasonable rates and compensation for the transportation of such mail matter by railway common carriers and the service connected therewith, prescribing the method or methods by weight, or space, or both, or otherwise, for ascertaining such rate or compensation, and to publish the same; and orders so made and published shall continue in force until changed by the commission after due notice and hearing. (28 U. S. C. 542)

* * * * * * *

The procedure for the ascertainment of said rates and compensation shall be as follows.

Within three months from and after the approval of this act, or as soon thereafter as may be practicable, the Postmaster General shall file with the commission a statement showing the transportation required of all railway common carriers, including the number, equipment, size, and construction of the cars necessary for the transaction of the business; the character and speed of the trains which are to carry the various kinds of mails, the service, both terminal and en route, which the carriers are to render; and all other information which may be material to the inquiry, but such other information may be filed at any time in the discretion of the commission. (28 U. S. C. 545)

* * * * * * *

All the provisions of the law for taking testimony, securing evidence, penalties, and procedure are hereby made applicable. (28 U. S. C. 548)

For the purpose of determining and fixing rates or compensation hereunder the commission is authorized to make such classification of carriers as may be just and reasonable and, where just and equitable, fix general rates applicable to all carriers in the same classification. (28 U. S. C. 549)

Pending such hearings, and the final determination of the question, if the Interstate Commerce Commission shall determine that it is necessary or advisable, in order to carry out the provisions of this section, to have additional and more frequent weighing of the mails for statistical purposes, the Postmaster General, upon request of the commission, shall provide therefor in the manner now prescribed by law, but such weighing need not be for more than thirty days. (28 U. S. C. 550)

At the conclusion of the hearing the Commission shall establish by order a fair, reasonable rate or compensation to be received, at such stated times as may be named in the order, for the transportation of mail matter and the service connected therewith and during the continuance of the order the Postmaster General shall pay the carrier from the appropriation herein made such rate or compensation. (28 U. S. C. 551)

Either the Postmaster General or any such carrier may at any time after the lapse of six months from the entry of the order assailed apply for a re-examination, and thereupon substantially similar proceedings shall be had with respect to the rate or rates for service covered by said application, provided said carrier or carriers have an interest therein. (28 U. S. C. 553)

For the purposes of this section the Interstate Commerce Commission is hereby vested with all the powers which it is now authorized by law to exercise in the investigation and ascertainment of the justness and reasonableness of freight, passenger, and express rates to be paid by private shippers. (28 U. S. C. 554)

* * * * * * *

That it shall be unlawful for any railroad company to refuse to perform mail service at the rates or methods of compensation provided by law when required by the Postmaster General so to do, and for such offense shall be fined $1,000. Each day of refusal shall constitute a separate offense. (28 U. S. C. 563)

APPENDIX B

OPINIONS AND DECREES OF THE THREE JUDGE UNITED STATES DISTRICT COURT FOR THE AUGUSTA DIVISION OF THE SOUTHERN DISTRICT OF GEORGIA

(Copied from Plaintiffs' Exhibit 1, the said Exhibit being the transcript of record, Supreme Court of the United States, October Term, 1937 No. 63, the United States of America and Interstate Commerce Commission vs. W. V. Griffin and H. W. Purvis, Receivers for Georgia & Florida Railroad, Appeal from the District Court of the United States for the Southern District of Georgia.)

OPINION AND DECREE—Filed January 23, 1935 (Trans. in No. 63 (1947) R. 29)

IN UNITED STATES DISTRICT COURT

In Equity, No. 207

W. V. GRIFFIN and H. W. PURVIS, Receivers for Georgia & Florida Railroad, Petitioners

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

OPINION AND DECREE—Filed January 23, 1935

This is a suit by W. V. Griffin and H. W. Purvis, Receivers of the Georgia & Florida Railroad, against the United States of America and the Interstate Commerce

Commission to enjoin, set aside, amend, and suspend an order of such Commission of May 10, 1933, denying an application for increased compensation for the transportation of mail. The suit is brought under U. S. C. A. Title 28, Sections 41 (27 and 28) and 43-48.

No other facts were established or sought to be established than those set forth in such order of said Commission, a copy of which is annexed to petitioners' complaint, and it is therefore considered unnecessary and redunant to restate "Findings of Fact" as provided by Equity Rule 70½. The challenge is to the conclusion drawn from undisputed facts.

The facts developed in the "cost study" fully set forth in such order of the Commission were ascertained by the application of rules prescribed by the Commission. All parties to this controversy agree that a "cost study" is not and cannot be mathematically correct but is an approximation. Such "cost study" discloses among other facts that "There was (1) a deficit in net railway operating income from mail of $4,945.00 based upon 1931 operations". It further disclosed that as regards revenue: "The distribution of expense upon the space ratios shows that the ratio for mail service was 102.79" or that for every dollar applicants received for transporting mails they expended one dollars and 2.79 cents.

The fact that this railroad lost more money on other services rendered by it or that other railroads transported mail under similar, if not identical conditions, at a profit or that this railroad belonged in a certain classification established by such Commission, known as Class 1 railroads and that therefore it should be in accord with other railroads of such Class as to compensation as to mail, do not refute or impair the fact that the compensation allowed this railroad for the transportation of mail does not equal the cost of so doing.

While it is true that "For the purpose of determining and fixing rates or compensation hereunder the Commission is authorized to make such classification of carriers as may be just and reasonable and * * * fix general rates applicable to all carriers in the same classification", it can fix

such rates only "Where just and equitable". 39 U. S. C. A., Section 549.

The transportation of mail by railroads is compulsory but they are "entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith." 39 U. S. C. A., Section 541.

There is no attack upon the efficiency of the operation of this railroad. There is no charge of extravagance. The bald fact remains that this railroad is required in order to escape severe punishment (39 U. S. C. A., Section 563) to transport mail at a compensation fixed by such Commission and that such compensation does not pay the actual cost of service. This compensation is not in compliance with the duty on the United States to pay "fair and reasonable compensation" and is not "just and equitable".

It is therefore ordered and decreed:

(1) That said order of the Interstate Commerce Commission of May 10, 1933, is and has at all times been unlawful and that said order be set aside and annulled.

(2) Said Commission shall take such further action in the premises as the law requires in view of the annulment and setting aside of the said order of May 10, 1933.

Inasmuch as this court has not the authority to fix the compensation we do not deal with the question of what per cent of return on the investment, if any, would be required to make the compensation fair and reasonable.

This 18th day of January, 1935.

SAMUEL H. SIBLEY,
United States Circuit Judge.
WM. H. BARRETT,
United States District Judge.
E. MARVIN UNDERWOOD,
United States District Judge.

[File endorsement omitted.]

OPINION AND DECREE—Filed February 23, 1937 (Trans. in No. 63 (1937) R. 55)

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, AUGUSTA DIVISION

In Equity, No. 228

W. V. GRIFFIN and H. W. PURVIS, Receivers for Georgia & Florida Railroad

v.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION

OPINION AND DECREE—Filed February 23, 1937

Effective August 1, 1928, the Interstate Commerce Commission (hereinafter called Commission), in Railway Mail Pay, 144 I. C. C. 675, established rates for transportation of mail by railroads over 100 miles in length and these rates were applied to the Georgia & Florida Railroad. Thereafter the receivers of such railroad made application to the Commission for an alteration of such rates so that they would be fair and reasonable for such railroad. After a test period, investigation and hearing from counsel for applicant and for the Postmaster General the Commission on May 10, 1933, declined to change the rates.

The receivers of such railroad then brought their petition before a Three-Judge Court against the United States of America and against said Commission, praying that said order of May 10, 1933, be declared unlawful and wholly void and that such Commission reopen and reconsider the proceedings and "determine the fair and reasonable rates to be received by petitioners for transportation of the mails, on and after said April 1, 1931".

"No other facts were established or sought to be established than those set forth in said order of said Commission, a copy of which is annexed to petitioners' complaint". "The challenge is to the conclusion drawn from the undis-

puted facts." (Previous decision of this court.) The court therefore deemed it unnecessary to state "Findings of Fact", but its judgment did declare certain facts as follows:

"(1) The facts developed in the 'cost study' fully set forth in such order of the Commission were ascertained by the application of rules prescribed by the Commission.

"(2) All parties to this controversy agree that a 'cost study' is not and cannot be mathematically correct but is an approximation.

"(3) 'The distribution of expense upon the space ratios shows that the ratio for mail service was 102.79' or that for every dollar applicants received for transporting mails they expended one dollar and 2.79 cents.

"(4) The fact that this railroad lost more money on other services rendered by it or that other railroads transported mail under similar, if not identical, conditions at a profit or that this railroad belonged in a certain classification established by such Commission, known as Class 1 railroads, and that therefore it should be in accord with other railroads of such class as to compensation as to mail, do not refute or impair the fact that the compensation allowed this railroad for the transportation of mail does not equal the cost of so doing. The Commission can fix such rates only 'Where just and equitable.'

"(5) The transportation of mail by railroads is compulsory but they are 'entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith.'

"(6) There is no attack upon the efficiency of the operation of this railroad. There is no charge of extravagance."

The said order was annulled and the Commission was directed to take such further action as the law requires. There was no appeal from this decision.

Thereafter the Commission of its own motion reopened such proceeding, which resulted in a report on February 4,

1936, again establishing the same rates which this court had declared unlawful.

It becomes important to ascertain what, if any, additional testimony, or what, if any, different rules of law warranted such conclusion.

For the reason that neither report states definitely "Findings of Fact" as such it is not easy to ascertain what different facts existed at the different hearings. We will do our best to ascertain the differences in facts and in rules of law following the course of discussion in the last report.

The report, after quoting from brief of applicant, states:

"There is implicit in the statement quoted, and in the corresponding portion of the opinion referred to, the assumption that if the department discontinues mail service on applicant's trains the applicant will thereby be saved the expenditures of $1.0279 for every dollar of revenue it thus loses."

We do not concur in this statement. The opinion definitely states that these figures were derived by "the distribution of expense upon the space ratios" and by the employment of methods approved or directed by the Commission. However, we deem this difference in interpretation immaterial.

The argument of the Commission to destroy the effect of its methods previously used is thus stated:

"* * * Relative costs derived from a series of studies of expenditures for operations common to a number of services cannot be converted into absolute costs by using a single figure relation derived from such studies.

"The cost computed in the manner described is a hypothetical cost and not an actual cost, and is not necessarily conclusive as applicant contends. In other mail-pay proceedings, in which space authorized and paid for was found to be the space that should be charged to mail in cost studies similar to that here, consideration was given to other factors as well, such as the amount and character of the unused space reported as operated (Railway Mail Pay, 85 I.C.C. 157, 170; 123 I.C.C. 33, 39); the actual space occupied by

mail, as distinguished from authorized space, determined by the mail load carried, based upon a count of bags and of packages outside of bags, and, in some instances, by the weight (Railway Mail Pay, 95, I.C.C. 493, 500, 511; 120 I.C.C. 439, 446); comparisons with compensation received from other services in passenger-train cars (Railway Mail Pay, 144 I.C.C. 675, 706); comparisons with freight rates (Railway Mail Pay, 144 I.C.C. 675, 705; 151 I.C.C. 734, 742); comparisons per car-mile and per car-foot miles of the computed cost of mail service and the revenue from authorized mail service with the computed cost of corresponding units in passenger-train service as a whole (Railway Mail Pay, 144, I.C.C. 675, 699); and the character of the service performed in connection with transporting the mail (Railway Mail Pay, 56 I.C.C. 1, 8; Electric Railway Mail Pay, 58 I.C.C. 455, 464; 98 I.C.C. 737, 755)."

Neither applicant nor this Court entertains the view that the hypothetical cost is "necessarily conclusive". It is merely the fairest method that has been devised. If "actual cost" as to each item be required applicants would be helpless and the Commission would be reduced to guessing. What elements may have been considered here, and should not be in the absence of supporting testimony and some indication as to what weight was given each element. Further, there is no testimony here as to "unused space reported as operated." There is included payment for unused space not operated, of which more later. There is nothing to justify disregard of the fact used in the first report that "space authorized for mail is regarded as space used."

The law as established in this case by the previous decision, unreversed, makes inapplicable "comparisons with compensation received from other services in passenger train cars"; "Comparisons with freight rates"; and "comparisons per car-mile and per car-foot mile of the computed cost of mail service and the revenue from authorized mail service with the computed cost of corresponding units in passenger-train service as a whole."

There is no criticism of "the character of the service performed in connection with transporting the mail."

Further argument of the Commission, as we understand

it, is that because 30 feet instead of 15 feet is partitioned off for mail this adds 15 feet to the unused space for which the post office department pays a part. We do not so understand the testimony. Our understanding is that the unused space is the same wherever the partition be placed.

There is however this further finding of fact implied, though not definitely stated, viz: that an unnecessarily large car is used and this adds to the portion paid by the mail for unused space and that if 15 feet were eliminated from the car the mail space ratio would be reduced to 10.79 per cent, resulting in a profit to applicant from mail of $1,711.

Lenghtily are theories and possibilities advanced to establish that a different result might be reached if different methods were employed "to ascertain and compute the proportions of operating expense and the separations into expenses for freight service and passenger service respectively", but there is no justification submitted for abandoning the method employed in making the first report, which was unchallenged as to accuracy and was admitted to have been apportioned "in accordance with the formulas prescribed for Class 1 roads for the separation of expenses between freight and passenger service."

The second report not only does not contradict this but reaffirms it in this language: "The methods are the same as those prescribed in our rules governing separation of such expenses on large steam railroads."

We find nothing that warrants any change in our conclusions as to the legality of the order now before us from our previous conclusion as to the same rates except the fact, stated by implication, that the use of a mixed car shorter by 15 feet would result in a profit from mail revenue of $1,711 annuallly. The report discloses "The total mail service investment thus derived was $457,682." This return is approximatley .0037 per cent. This is not "fair and reasonable."

Inasmuch as all the facts constituting the bases for the order of the Commission are fully set out in the report, it is deemed unnecessary to restate them in this opinion as findings of fact, it is therefore ordered and decreed

(1) That said order of the Interstate Commerce Commission of February 4, 1936, is and has at all times been unlawful and that said order be set aside and annulled.

(2) Said Commission shall take such further action in the premises as the law requires in view of the annulment and setting aside of the said order of February 4, 1936.

This 22nd day of February, 1937.

SAMUEL H. SIBLEY,
United States Circuit Judge;
WM. H. BARRETT,
United States District Judge;
E. MARVIN UNDERWOOD,
United States District Judge.

(File endorsement omitted.)

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